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No. 466

IN THE

Supreme Court of the United States

October Term, 1965

AUGUST J. LIPPI,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JACOB W. FRIEDMAN,
Attorney for Petitioner.

EDWIN M. KOSIK,
Of Counsel.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth 2-0639

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IN THE

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OCTOBER TERM, 1965

AUGUST J. LIPPI,

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AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner August J. Lippi respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the Middle District of Pennsylvania, convicting petitioner of income tax evasion (26 U. S. C. 7201) and conspiracy (18 U. S. C. 371), and imposing a prison sentence of three years and a fine of $5,000.00.

Opinions Below

The Court of Appeals rendered an opinion by Ganey, Circ. J., not yet at this writing reported, and printed in the appendix accompanying this petition. The memorandum opinion of Follmer, D.J., on the motion for arrest of judgment or for a new trial is likewise appended. The case was argued in the Court of Appeals on October 8, 1964, and decided on June 21, 1965.

Jurisdiction

The judgment of the Court of Appeals was entered on June 21, 1965. On or about July 19, 1965, Mr. Justice White signed an order extending petitioner's time to file petition for writ of certiorari to and including August 20, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254; 18 U. S. C. Sec. 2 (a); 18 U. S. C. Sec. 371 and 26 U. S. C. Sec. 7201.

Statutes and Rules Involved

The statutes and rules involved are 18 U. S. C. Secs. 371, 3481 and 3500; 26 U. S. C. Sec. 7201; and Rules 7(c), 12(b-2) and 33 of the Federal Rules of Criminal Procedure. These are printed in the appendix hereto.

Facts and Proceedings

Inasmuch as the points of law relied upon by petitioner do not involve any extended inquiry into the proof, no useful purpose is served by detailing the evidence. The lengthy trial included many exhibits and the testimony of numerous witnesses.

The Government's theory was that the five defendants agreed to and did place on the corporate defendant's payrolls several pretended employees, in consequence of which the defendants were enabled to and did siphon off a part of the corporation's earnings, so as to reduce its taxable income. A goodly portion of the proof sought to show that the services for which compensation was given were not substantial. To illustrate, one employee, Joan Lippi Ochreiter, was petitioner's daughter. She explained the payments to her by testifying that she had rendered professional services as a chiropodist to various employees in accordance with arrangements made by her husband.

In any view the case clearly presented triable issues of fact, so that errors arising in the course of the proceedings are deserving of consideration.

Questions Presented and Reasons for Granting Writ

1. Is the conspiracy count of the indictment sufficient in law?

2. Was it error to receive in evidence declarations of an alleged co-conspirator after termination of the alleged conspiracy?

3. Should a mistrial have been granted by reason of improper references to petitioner's failure to testify?

4. Did the statement improperly withheld by the Government constitute such newly discovered evidence as to entitle petitioner to a new trial?

These will be considered seriatim.

ARGUMENT

POINT 1

The conspiracy count of the indictment is insufficient in law, and should have been dismissed.

The District Court denied defendant's motion to dismiss (4a), and the propriety of that ruling is challenged.

Petitioner and three others are charged in the second count of the indictment (25a) with having conspired "to commit certain offenses against the United States", to wit:

> "(a) The offenses of wilful attempts to evade and defeat, corporate income taxes of Knox Coal Company for the fiscal year ended June 30, 1957, a felony, in violation of Section 7201 of Title 26 of the United States Code."

This is followed by three paragraphs purporting to allege the means by which the conspiracy was to be accomplished (26a) and by thirteen alleged overt acts (26a-28a).

In urging the insufficiency of the foregoing charge we must bear in mind the classic distinction between an agreement to commit a crime and an agreement to commit a lawful act by criminal means. In the first instance (pertinent herein) the purpose must be fully and clearly charged, and only in the second type of case do the means become material.

A leading case on the subject is *Pettibone* v. *United States*, 148 U. S. 197, where the Supreme Court held (by Mr. Chief Justice Fuller):

> "A conspiracy is sufficiently described as a combination of two or more persons, by concerted

> action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted * * * that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

See also *Keck* v. *United States*, 172 U. S. 404, 437.

Nor may resort be had to the averments of overt acts to supply insufficiency in the charging language itself. *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 535; *United States* v. *Apex Distributing Co.* (D. C., R. I.), 148 F. Supp. 365. The latter decision was recently cited with approval in *Russell* v. *United States*, 369 U. S. 749, 766.

The case comes clearly within the Third Circuit holding in *United States* v. *Deutsch*, 243 F. 2d 435, wherein the indictment for conspiracy charged defendants with having conspired "to commit offenses against the United States, and more particularly, with intent to defeat the Bankruptcy Law (Title 18 U. S. C., Section 371)." Even though no timely challenge was interposed, the Court ruled the count insufficient, holding (by Hastie, Circ. J.):

> "* * * We think a statement that the substantive offense has been committed cannot reasonably be substituted for or treated as the equivalent of a statement or conspiratorial agreement in con-

> nection therewith * * *. But the allegation of such evidentiary matter is no substitute for charging the essence of the conspiracy itself."

To like effect is the holding in *Hamner* v. *United States* (C. A. 5th Circ.), 134 F. 2d 592, 595.

The count under consideration is inadequate in three major respects. The elements of the crime at whose commission the conspiracy was alleged to be aimed (26 U. S. C. 7201) are an attempt to evade or defeat, wilfulness and additional tax due or owing. See *Spies* v. *United States*, 317 U. S. 492 (methods of evasion illustrated); *United States* v. *Martell* (C. A. 3d Circ.), 199 F. 2d 670 (wilfulness a *sine qua non*); and *United States* v. *Schenck* (C. C. A., 2d Circ.), 126 F. 2d 702 (necessary to prove additional tax owing). Rule 7 (c) of the Rules of Criminal Procedure requires a "statement of the essential facts constituting the offense charged." However liberal pleading may have become, it is still the law, as stated in *United States* v. *Tornabene* (C. A. 3d Circ.), 222 F. 2d 875, 878 (Staley, Circ. J.):

> "We cannot dispense with the requirement that the indictment charge all essential ingredients of a crime."

Also, it must be remembered that "conspiracy to commit a particular crime cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." Mr. Justice Stewart in *Ingram* v. *United States*, 360 U. S. 672, 678, quoting 72 Harv. L. Rev. 920, 939.

Another important aspect in which the conspiracy count is fatally defective is that it charges a conspiracy to commit "the offenses of wilful attempts"—both terms

being pleaded in the plural. 18 U. S. C. Section 371, defining conspiracy, limits it to an "offense". Several alleged attempts may not be consolidated to constitute a single crime. A series of episodes are not properly the elements of the crime at which a conspiracy is aimed. See *United States* v. *Goss* (C. A., 4th Circ.), 329 F. 2d 180 (advance sheets of May 4, 1964).

Finally, it must be remembered that "the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding." Fed. R. Crim. Proc. 12 (b) (2).

POINT 2

It was error to receive in evidence declarations of an alleged conspirator after termination of the alleged conspiracy.

The indictment named a corporation and four individuals as defendants. Of the latter only two—petitioner and Josephine Sciandra—were being tried. Defendant Robert L. Dougherty, although charged as a co-conspirator, was not on trial. Accordingly, by virtue of the law as hereinafter outlined, petitioner was entitled to a trial free from any post-conspiracy declarations of Dougherty. The manner in which this principle was egregiously violated will now be demonstrated.

In proving its case the Government offered evidence to substantiate distribution of income to the defendants or their nominees in various amounts. The Government thus relied upon a theory that distribution was made to groups allegedly intended to be represented by the individual defendants. Thus Government's Exhibit #159 includes petitioner in Group #4 and summarizes distribu-

tions to him by way of payroll sheets in the amount of $26,776.00, drainage expense in the amount of $18,120.00, and other amounts all totalling $63,396.00. With regard to the amounts mentioned on payroll sheets the Government alleged, *inter alia*, the employment of Joan Lippi Ochreiter, a daughter of petitioner and one Mary Friday. Concerning drainage expense, the Government attributed the income paid to a Melosi and a Boccacini (Tr. p. 873) in the amount of $18,120.00, to petitioner. As part of the evidence adduced at the trial the Government offered the testimony of George Daileda, an admitted perjurer, to the effect that petitioner presented to him for cashing the checks of Melosi and Boccacini (Tr. pp. 816-818). However, on cross-examination the same witness admitted he gave entirely different testimony when being interviewed by Internal Revenue Agents (Tr. pp. 851-852). There is no other evidence connecting the petitioner with Melosi and Boccacini except for certain post-conspiracy admissions of a co-defendant, Robert Dougherty, who was not on trial. These post-conspiracy admissions were presented by the Government through an Internal Revenue Agent Malinak (Tr. pp. 869 and 877). The agent testified:

> "Mr. Dougherty told me these checks were paid to Louis Melosi and Joseph Boccacini but that these gentlemen did not perform drainage work for the Knox Coal Company or any other services directly connected with the operation of the mine * * *."

This evidence was objected to by defense counsel (Tr. p. 872). It served to corroborate and add credibility to the evidence of George Daileda, an admitted perjurer. It is significant to note that the testimony implicated petitioner to the extent of $18,120.00 in income. In addition,

the Court permitted an additional admission of Robert Dougherty pertaining to the absence of women working on the premises of Knox Coal Company (Tr., pp. 877-878, 900).

We proceed to examine the development of the law on this much litigated subject. In *Fiswick* v. *United States*, 329 U. S. 211, this Court had under consideration the admissibility of statements made by a co-conspirator after the termination of the conspiracy. A conviction of conspiracy to defraud the United States in the exercise of its governmental functions by violating the Alien Restriction Act of 1940 was reversed, solely on the ground that the trial Court erred in receiving against petitioner's testimony as to statements made by a co-conspirator after the termination of the conspiracy. The general rule was thus stated in the opinion of Mr. Justice Douglas:

> "While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, *Pinkerton* v. *United States*, 328 U. S. 640, 646, 647, and cases cited, all such responsibility is at an end when the conspiracy ends. *Logan* v. *United States*, 144 U. S. 263, 309; *Brown* v. *United States*, 150 U. S. 93, 48. Moreover, confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the Circuit Court of Appeals thought, the maintenance of the plot to deceive the government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot

was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators. *Gambino* v. *United States* (C. C. A. 3d Pa.) 108 F. 2d 140, 142, 143."

In the same opinion the Court adopted the time of the last overt act as the line of demarcation fixing the end of the conspiracy, saying;

> "The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.
>
> * * * * * *
>
> "If, as we think, the conspiracy charged and proved did not extend beyond the date of the last overt act, the admissions of each petitioner were improperly employed against the others."

An examination of the authorities in the various circuit courts shows that for more than fifty years it has been universally held that evidence of the type attacked herein is inadmissible in criminal prosecutions. We shall refer briefly to several illustrative cases.

The Second Circuit has quite frequently condemned such proof. Thus, in *Feder* v. *U. S.* (C. C. A. 2d, 1919), 257 F. 694, Hough, Circ. J., wrote:

> "This conspiracy had come to an end, and when that occurred, 'whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others'."

Similarly, in the leading case of *Van Riper* v. *United States* (C. C. A. 2d, 1926), 13 F. 2d 961, L. Hand, Circ. J., wrote:

> "Merely narrative declarations are not competent."

Again in *United States* v. *Lonardo* (C. C. A. 2d, 1933), 67 F. 2d 883, in reversing a conviction, L. Hand, Circ. J., wrote:

> "The statements of Hatlen and Gates were admitted against him over his objection; the prosecution's theory being that the concerted purpose of the confederates had not yet been completely fulfilled, and that the declarations of one were admissible against the rest until it was. We need not pause to consider whether in fact the common purpose had ended, because it would make no difference if it had not. Declarations of a confederate made after his arrest will not, except in most unusual cases, be in furtherance of the common plan."

In *United States* v. *Groves* (C. C. A. 2d 1941), 122 F. 2d 87, a narrative statement of a co-conspirator made after the termination of the conspiracy was held to have been improperly admitted, and necessitated a reversal of the conviction.

Also, in *United States* v. *Goodman* (C. C. A. 2d, 1942), 129 F. 2d 1009, it was held that the statements of an alleged co-conspirator, to be admissible against others than the declarant, must not only be made while the conspiracy is pending, but must also be in furtherance of the

object of the conspiracy, and mere narrative declarations are excluded. Swan, Circ. J., wrote:

> "Einhorn's statements that Goodman had been his partner in the bankrupt's business were not made to procure goods or money for his corporation. They were merely narrative declarations of a past fact. We are unable to imagine any way in which they could have furthered the objects of a conspiracy to conceal assets, transfer assets or falsify books. Nor does the Government's brief suggest any or attempt to answer the appellant's argument on this point. * * * We conclude that it was error to admit such statements as against the appellant, and we cannot say that this evidence was non-prejudicial."

The rule was the same in the Third Circuit, where, in *Gambino* v. *United States* (C. C. A. 3, 1939), 108 F. 2d 140, Maris, Circ. J., wrote, in reversing a conviction:

> "It, therefore, follows that assertions made by an accomplice after the termination of the conspiracy come within the prohibition of the hearsay rule and are inadmissible."

This holding was expressly approved by the Supreme Court in the *Fiswick* case, *supra*.

Likewise, the Fourth Circuit, in *Hauger* v. *United States* (C. C. A. 4, 1909), 173 F. 54, reversed a conviction because the declarations and confessions of an alleged co-conspirator after the offense had been committed and the parties had been arrested were held to be inadmissible

against the accused. Boyd, Circ. J., quoted from *Queen* v. *Hepburn*, 11 U. S. 290, and added:

> "So strictly have the courts guarded and applied the rule that hearsay has been held incompetent even in aid of human freedom."

Again, in *Dowdy* v. *United States* (C. C. A. 4, 1931), 46 F. 2d 417, the Court held statements of a co-defendant after arrest, not in defendant's presence, inadmissible and reversible error since they were obviously after the termination of the conspiracy and not in furtherance thereof.

The rule is the same in the Fifth Circuit, for in *Hogg* v. *United States* (C. C. A. 5, 1931) 53 F. 2d 967, Bryan, Circ. J., ruled that reference by a co-conspirator to defendant as his boss, made after the termination of the conspiracy, was inadmissible against defendant, "because at that time the conspiracy had been broken up, and the statement attributed to Johnson was nothing but hearsay."

In *Bryan* v. *United States* (C. C. A. 5, 1927), 17 F. 2d 741, it was held that the admission of testimony of a witness that on the morning after defendant's arrest she was visited by a third person, and of the conversation between them, which tended to show that the visitor was attempting to conceal evidence against defendant, in the absence of any evidence that defendant authorized or had knowledge of such visit, was prejudicial error. Bryan, Circ. J., wrote:

> "The Government seeks to sustain the ruling on the theory that Ison, though not indicted, was a conspirator, and consequently his declarations and conduct were binding on the other conspirators.

> But there is no evidence that the conspiracy continued beyond the time of the seizure, and it is well settled that the declarations and conduct of a conspirator are binding only upon himself after the conspiracy has been abandoned or broken up."

The Court further held that the testimony was not harmless because merely cumulative; nor could the admission be justified on the theory of an attempt by defendant to conceal evidence of his guilt. The judgment of conviction was reversed on this ground alone. This decision was explicitly recognized as having reached a conclusion diametrically opposed to that which was the result herein.

Another important decision in the same circuit is *Clark* v. *United States* (C. C. A. 5, 1932), 61 F. 2d 409. There a conviction was reversed, the Court saying:

> "As the statements were made by Thomas in August, it is possible that the conspiracy had been abandoned. At any rate, they were merely a narrative of past events. And clearly they were not made by Thomas in furtherance of the conspiracy, and were not made part of the *res gestae* of any overt act. It would be extending the rule to unreasonable limits to permit these statements made by a coconspirator, not on trial, to be admitted. Considering the conflicting evidence before the jury, we cannot say that the testimony, improperly admitted, was harmless. These errors require a reversal of the judgment."

The same Court quoted with approval from Underhill on Criminal Evidence, Section 493:

> "But those declarations only are admissible which are made by a conspirator during the exis-

> tence of the conspiracy and in furtherance of it. The statements of a conspirator, made after the conspiracy has ceased to exist, either by success or failure, and which are merely narrative of past events (though in form a confession, i. e., an admission of the conspiracy) are not receivable against a fellow-conspirator unless the latter was present when they were made and heard them, and expressly or by implication acquiesced in them."

Similarly, in *Seeman* v. *United States* (C. C. A. 5, 1936), 90 F. 2d 88, Foster, Circ. J., wrote:

> "But declarations of a co-conspirator made after the conspiracy has terminated, by success or failure, are not admissible against any other person than himself unless that person was present when they were made."

The same rule was followed in *Nibbelink* v. *United States* (C. C. A. 6, 1933), 66 F. 2d 178, where a conviction was reversed and Moorman, Circ. J., wrote:

> "Before the declarations of coconspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made."

The rule was likewise applied in the Seventh Circuit in *Collenger* v. *United States* (C. C. A. 7, 1931), 50 F. 2d 345, where the conviction was reversed, Altschuler, Circ. J., writing:

> "It is too plain for discussion that this statement to the Government agent, far from further-

> ing the conspiracy, was made after the conspiracy had ended, and with the purpose of exposing it and penalizing the conspirators, and was hearsay as to all the defendants except Orta * * *. Where there are many defendants on trial charged with a general conspiracy, each is subject to the hazard of being injuriously affected by alleged acts or statements of some other defendants, incompetent as to all but the ones making the statements. In such situations courts should be ever alert to minimize, so far as possible, the hazard to defendants whom the law does not bind by such statements."

The rule in the Eighth Circuit has been applied to a variety of situations. Thus, in *Sorenson* v. *United States* (C. C. A. 8, 1906), 143 F. 820, Sanborn, Circ. J., wrote:

> "Where two or more defendants are jointly tried for the same offense, or for a conspiracy to commit it, the declaration of no one of them, made in the absence of another after the completion of the offense, is competent evidence against the latter."

In *Fain* v. *United States* (C. C. A. 8, 1913), 209 F. 525, it was held that, while the act of one conspirator in the prosecution of the enterprise was, after proof of the conspiracy, competent evidence against all, his admissions in his narration of past events after the conspiracy had come to an end, whether by success or failure were inadmissible against his fellows. The evidence was accordingly held incompetent against the appellant, and the judgment of conviction was reversed.

In *Heard* v. *United States* (C. C. A. 8, 1919), 255 F. 829, in reversing a conviction, Sanborn, Circ. J., wrote:

> "While in cases of conspiracy, the act of one conspirator in the prosecution of the enterprise for the purpose of attaining its object is evidence against all, the act, declaration, or admission of one conspirator by way of narrative of past facts after the conspiracy has come to an end, either by success or failure in attaining its object, is not admissible against the others."

Cf. *Gerson* v. *United States* (C. C. A. 8, 1928), 25 F. 2d 49, where the same rule was applied to acts committed prior to the formation of the conspiracy.

The rule in the Ninth Circuit is identical, for in *Tofanelli* v. *United States* (C. C. A. 9, 1938), 28 F. 2d 580, Rudkin, Circ. J., wrote:

> "The test whether the statement or declaration of one conspirator is admissible against the others does not depend entirely upon whether the statement was made during the existence of the conspiracy. The statement or declaration must not only have been made during the continuance of the conspiracy but it must likewise have been made in furtherance of its object."

A discussion of the authorities is contained in *Mayola* v. *United States* (C. C. A. 9, 1934), 71 F. 2d 65, where the Court quotes with approval from the earlier holding in the same Circuit in *Sugarman* v. *United States* (C. C. A. 9), 35 F. 2d 663, where it was held:

> "The true rule is that acts and declarations of one conspirator, in furtherance of the object of

the conspiracy and during its existence, are binding on all members of the conspiracy, whether present or absent."

In the same opinion the rule of *Kelton* v. *United States* (C. C. A. 3), 294 F. 491, in the following language, was quoted with approval:

> "Before the declarations of coconspirators can be received in evidence against one charged with participation in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made."

Finally, there is the Tenth Circuit, where in *Minner* v. *United States* (C. C. A. 10, 1932), 57 F. 2d 506, Phillips, Circ. J., wrote:

> "The acts or declarations of a conspirator prior to the formation of the conspiracy or after its termination are not admissible against his coconspirators."

Likewise, in *Holt* v. *United States* (C. C. A. 10, 1937), 94 F. 2d 90, in reversing a conviction, Phillips, Circ. J., wrote:

> "Alexander was a coconspirator and the acts and declarations of a coconspirator during and in furtherance of the conspiracy are admissible against his coconspirator. But the statement made by Alexander tended to defeat rather than further the conspiracy. It was a narration of past events,—a confession of Alexander who was not on trial, and was clearly inadmissible for any purpose."

It is thus plainly established that whenever the question has arisen, the several Circuit Courts of Appeals have come to the same conclusion, namely, that, in order to render declarations of co-conspirators admissible against an alleged conspirator who was on trial, the declarations must fulfill the two requirements that they be made during the pendency of the conspiracy and with a view towards promoting its success.

Any lingering question as to the law on the point was set at rest by the holding in *Krulewitch* v. *United States*, 336 U. S. 440. What was there involved was the admissibility over objection of a witness' testimony purporting to include a post-conspiracy statement of a person who had assisted in the commission of the alleged crime. The declaration quoted by the Court, consisted of simply the following (transcript of record in that case, p. 111):

> "But she said 'It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it.'"

The Krulewitch trial consumed more than two weeks. Nevertheless, the tenuous imputation of guilt contained in the foregoing quotation was held to vitiate the conviction. The Court ruled that a hearsay declaration of a co-conspirator not made in furtherance of the scheme's objective was inadmissible. That holding has been cited in more than a hundred reported cases, and is controlling authority for the exclusion of any "declaration by one alleged conspirator against another, made out of the latter's presence and without proof that he had in any manner authorized it." *United States* v. *Wortman* (C. A. 7), 326 F. 2d 717. This Court itself has had several

occasions to refer to "the teaching of *Kurlewitch.*" *Lutwak* v. *United States,* 344 U. S. 604; *Delli Paoli* v. *United States,* 352 U. S. 232.

Finally, it became necessary to consider the question of whether a co-conspirator's statement might be utilized to corroborate where it was admittedly insufficient to convict. This Court rejected even such attempted use of the objectionable proof in *Wong Sun* v. *United States,* 371 U. S. 471, where Mr. Justice Brennan wrote:

> "The second governing principle, likewise well settled in our decisions, is that an out-of-court declaration made after arrest may not be used at trial against one of the declarant's partners in crime. While such a statement is 'admissible against the others where it is in furtherance of the criminal undertaking * * * all such responsibility is at an end when the conspiracy ends.' *Fiswick* v. *United States,* 329 U. S. 211, 217. We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking. See *Krulewitch* v. *United States,* 336 U. S. 440, 443-445. And where post conspiracy declarations have been admitted, we have carefully ascertained that limiting instructions kept the jury from considering the contents with respect to the guilt of anyone but the declarant * * *. We have never ruled squarely on the question presented here, whether a codefendant's statement might serve to corroborate where it will not suffice to convict. We see no warrant for a different result so long as the rule which regulates the use of out-of-court statements is one of admissibility, rather than simply of

> weight, of the evidence. The import of our previous holding is that a coconspirator's hearsay statements may be admitted against the accused for no purpose whatever, unless made during and in furtherance of the conspiracy."

In its memorandum decision denying the motion in arrest of judgment, the District Court disposed of this point (36a-37a) by pointing out that no mention was made of petitioner; that no objection was made to the testimony; that the latter was "merely corroborative of other testimony"; and that it was admissible against the corporation. We submit that none of these propositions is valid.

(1) We have already indicated above the direct bearing of the alleged admissions on the issue of petitioner's guilt, so that failure to mention him explicitly would have been immaterial. However, the Court's suggestion that petitioner was not mentioned is scarcely accurate, for when an objection to certain conclusions of the witness was being argued, the prosecutor a half dozen times stressed how the proof tied in petitioner, urging (Tr., pp. 881-882) that a substantial number of the persons on the payroll were "blood relatives of Mr. Lippi;" that the tax returns of a number of them had been prepared by the "personal secretary to Mr. Lippi;" that Mr. Lippi personally presented "some of the checks for negotiation;" that Carmello Sciandra "was a name supplied by Mr. Lippi;" that one of the recipients was "the wife of Mr. Lippi's personal secretary;" and these were "a group of persons for whose wages Mr. Lippi was instrumental." In short, the manifest purpose of this whole line of proof was to implicate petitioner in the guise of showing a case against the phantom corporate defendant.

(2) Objection was repeatedly made to the testimony (Tr., pp. 869, 870, 871, 872).

(3) Even though the proof complained of is merely corroborative, it is equally inadmissible, as this Court precisely held in *Wong Sun* v. *United States,* 371 U. S. 471.

(4) So far as supposed admissibility against the corporation is concerned, this must be viewed as little more than a pretext for the use of material prejudicial to petitioner. Even though Dougherty was president of the corporation, that did not authorize him to make statements suggesting corporate criminality. Whatever he may have said about his own culpability, his position did not empower him to make any admission which would be a concession of even civil liability. *Burns* v. *Jos. Flaherty Co.,* 278 Pa. 579, 123 A. 496. In a criminal prosecution of a principal, an alleged admission of an agent will not be received unless it has been expressly authorized. *Engle* v. *United States,* 48 App. D. C. 466. Even more important is the fact that the corporation was not actually on trial—only nominally so. While Arthur A. Maguire, Esq., had entered a not guilty plea on its behalf, when the case was called for trial, he declared that he "had no responsibility of remaining * * * to represent the corporate defendant" and was "voluntarily absenting [him]self from further participation in the trial" (Tr. p. 12). From thenceforth the corporation was unrepresented; no attorney made any opening or closing address for it; no witnesses were examined for or called by the corporation; nor did anybody make any motions or objections on its behalf. In truth, only the two individual defendants were being tried. The shadowy and contrived assumption that there was also a corporate

defendant whose guilt had to be ascertained certainly did not entitle the prosecution to the privilege of introducing proof prejudicial to petitioner, in reliance on the theory of admissibility against the corporation (Tr. p. 870).

The Court of Appeals also ruled (p. 14) that the challenged testimony dealt with matters within Dougherty's knowledge and were therefore admissible against the corporation of which he was an officer. Wholly apart from the anomalous status of the corporation as a defendant, the holding is at variance with established law. While statements contemporaneous with the transaction may be received (*Xenia Bank* v. *Stewart*, 114 U. S. 224), as may authorized declarations in the course of testifying before a Senatorial Committee (*Pan American Co.* v. *United States*, 273 U. S. 456), subsequent incriminating or prejudicial statements are not so regarded.

As this Court stated in *Packet Co.* v. *Clough*, 87 U. S. 528, in reversing because of the erroneous reception of such evidence:

> "* * * An act done by an agent cannot be varied, qualified or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and this declaration is not part of the *'res gestae'*."

To like effect are the holdings in *First National Bank* v. *Rust* (C. C. A. 5), 257 F. 29; *Holmes* v. *Montauk Steamboat Co.* (C. C. A. 2), 93 F. 73; and *Albert* v. *Public*

Service Mut. Cas. Ins. Corp., 266 App. Div. 284, 42 N. Y. S. 124, affd. 292 N. Y. 633.

Even if it be assumed—although without justification—that the proffered evidence is admissible against a corporation, we reiterate that the nominal presence of the corporation's name in the indictment, with no attorney participating in the trial to protect its rights, did not warrant the offer of the prejudicial evidence. When its counsel withdrew before the trial commenced, a severance might have been in order. Surely petitioner was not bound to anticipate that the nominal persistence of the corporate defendant was going to be invoked as a pretext or foundation for the introduction of evidence superficially aimed at the corporation but highly damaging to him. Such course is fraught with grave possibility of abuse and does not merit judicial sanction. The Court of Appeals ruled the evidence admissible against the Company "since there was no objection on the part of the Company" (p. 14). Certainly petitioner's counsel had no standing to interpose any objection available to a defendant he did not represent.

POINT 3

Improper references to petitioner's failure to testify constituted reversible error.

Mr. Degillio, the attorney for the codefendant on trial (Josephine Sciandra), stressed in his summation that "Mrs. Sciandra took the stand" (Tr., p. 1084), and later remarked (Tr., pp. 1093-1094):

> "This woman does not know what questions she is going to be asked, and believe me for a lawyer to [put] a defendant on the stand, unless they

themselves believe they are not guilty, don't do it, but she says she wanted to tell these people, and she did."

Then, just as the prosecutor was beginning his rebuttal summation, the following colloquy took place between Court and the United States Attorney—all in the jury's presence (Tr., p. 1100; 38a)—with emphasis supplied:

"The Court: I don't think there is any rebuttal of Mr. Kosik's case. *He didn't take the stand.* Doesn't that give him the final closing? You do have rebuttal as to Mrs. Sciandra. Don't you agree?

"Mr. Brown: Yes, I believe that is so because *he didn't take the stand.* What the judge has just remarked, that since *Mr. Lippi didn't take the stand* that we will be limited in our rebuttal remarks to what Mr. Degillio had to say * * *."

While the Court subsequently instructed the jury that they were to draw no inference from petitioner's failure to testify (40a), we submit that this neither eradicated the effect nor detracted from the error. The Court's later effort to excuse the references as "a slight lapse" (Tr., p. 1142) was equally ineffective. Moreover, the situation is not remedied by the Court's later expression in its opinion (39a):

"The fact that Lippe did not take the stand was certainly evident to the jury."

This observation might be made in every case where the rule is violated.

18 U. S. Code Sec. 3481 declares that a defendant's failure to testify shall create no presumption against

him. Comment upon such failure has long been regarded as reversible error. *Wilson* v. *United States,* 149 U. S. 60. Mr. Justice Field declared in that case:

> "The minds of the jurors can only remain unaffected by excluding all reference to it."

Recently, in *White* v. *United States* (C. A., D. C.), 314 F. 2d 243, the sole comment by the prosecutor was a passing reference to defendant's failure to testify coupled with the admonition, "No inference at all is to be given to you by the fact that he exercised this right." The Court later instructed the jury "that no inference of guilt arises against defendant because of his failure to testify as a witness in his own behalf," and explained the rationale of the rule. The episode was held to constitute reversible error.

We proceed to cite a few more recent cases. In *United States* v. *Schwartz* (C. A. 3d Circ.), 354 F. 2d 355, the Court declared (by Ganey, Circ. J.):

> "There are times when no admonition or instruction of the court can remove from the jurors' minds the effect of improper conduct and remarks of counsel."

Nor is the proscription limited to remarks of the prosecutor. Especially pertinent herein—in view of the comment by Mr. Sciandra's counsel—is the decision in *De-Luna* v. *United States* (C. A. 5th Circ.), 308 F. 2d 140, reh. den. 324 F. 2d 375, where it was said:

> "* * * An accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come from a codefendant's attorney * * *.

> "If comment on an accused's silence is improper for judge and prosecutor, it is because of the effect on the jury, not just because the comment comes from representatives of the state. Indeed, the effect of the comment by a codefendant's attorney might be more harmful than if it comes from the judge or prosecutor."

In *Stewart* v. *United States,* 366 U. S. 1, a mere reference, in the form of a question, to the fact that on two earlier trials the defendant had failed to testify was held reversible error.

Other oblique references to what the law forbids have repeatedly been condemned. Thus a prosecution argument that the state does not want the jury to consider defendant's failure to testify is deemed error. *Brumbelow* v. *State,* 122 Tex. Cr. 198, 54 S. W. 2d 528. The most covert reference may require a reversal. *People* v. *Vario,* 257 A. D. 975, 13 N. Y. S. 2d 41. As was said in *Quinn* v. *People,* 123 Ill. 333, 15 N. E. 46:

> "As well try to brush out with the hand a stain of ink on white linen."

It is quite generally held in state courts that a new trial will be granted for comment on failure of a defendant to testify, even though the remark is withdrawn and the court has instructed the jury to ignore it. *Angelo* v. *People,* 96 Ill. 333, 15 N. E. 46; *State* v. *Holmes,* 65 Minn. 230, 68 N. W. 11; *Sanders* v. *State,* 73 Miss. 444, 18 So. 54; *State* v. *Conway,* 348 Mo. 580, 154 S. W. 2d 128; *Harper* v. *State,* 133 Tex. Cr. 255, 110 S. W. 2d 67; *State* v. *Cameron,* 40 Ut. 555; *State* v. *Stahl,* 236 La. 362, 107 So. 2d 670.

The importance of the point is attested by the fact that only a few months ago this Court invalidated a Cali-

fornia constitutional provision permitting comment upon a defendant's failure to explain or deny any evidence against him (*Griffin* v. *California*, April 28, 1965).

In the case at bar the series of references, coupled with the striking contrast adverted to by counsel for the codefendant, could not fail to make a lasting impact. Furthermore, as Mr. Justice Jackson trenchantly observed in *Krulewitch* v. *United States*, 336 U. S. 440, every practicing lawyer knows that instructions to a jury to disregard something are simply an unmitigated fiction.

POINT 4

The motion for a new trial should have been granted in view of the Government's failure to furnish a statement in violation of 18 U. S. Code Sec. 3500.

The application for a new trial, duly made pursuant to Rule 33 F. R. Crim. Proc. was denied by the Court below with a memorandum opinion (45a-55a).

One of the chief witnesses against petitioner was George Daileda, who testified that he had cashed for defendant checks payable to others (46a). After his direct testimony petitioner's counsel requested previous statements of the witness pursuant to 18 U. S. C. Sec. 3500 (45a). In a subsequent trial involving an Avon Mining Company (and wherein petitioner herein was also a defendant) it developed that on May 8, 1959, the witness had been interviewed by a Special Agent Richman and had been asked 231 questions including the following (52a):

> "Q. Did Mr. Lippi ever bring in anyone else's checks other than his personal check? A. No."

On cross-examination herein (47a-51a) the witness admitted having lied upon former occasions, but the lengthy statement referred to was not delivered to petitioner's counsel. Even on the motion for a new trial the statement was made available only to the Court, which quoted from it in its opinion (52a).

We submit that the withheld statement comes squarely within the requirements discussed in *United States* v. *Rutkin* (C. A. 3d Circ.), 208 F. 2d 647. To like effect is *Coates* v. *United States* (C. A., D. C.), 174 F. 2d 959. There was no justification herein for the Government's failure to disclose prior contradictory statements under oath, and petitioner was deprived of material matter which might well have impelled the jury to reach a contrary conclusion. See also *Ogden* v. *United States* (C. A., 9th Circ.), 303 F. 2d 724, where the Jencks Act was thus construed:

> "* * * Effectiveness of the Act, and the realization by the defendant of the rights which the Act accords him, necessarily depend upon a fair and full disclosure by the government. The court and the defendant must grope; only the government knows the contents of its own files. When the question of Jencks Act production is properly raised by defendant, it is incumbent upon the government to make the fullest disclosure to the Court, withholding nothing from the Court which might conceivably come within the Act."

The correctness of petitioner's position as to the relevancy of the statement and the immediate duty of the trial Court is sustained by the cases, *Campbell* v. *United States*, 365 U. S. 85, 92; *Palermo* v. *United States*, 360 U. S. 343; *Scales* v. *United States*, 367 U. S. 203; *United States* v. *Accardo* (C. A. 1st Circ.), 298 F. 2d 133.

Moreover, the mere discrediting by other inconsistencies could negative the crucial importance of further discrediting. *Harrell* v. *United States* (C. A., D. C., 1963), 317 F. 2d 580. See also, *Williams* v. *United States* (C. A., D. C., 1963), 328 F. 2d 178. There is no need to speculate as to the outcome if the withheld statement had been available. It is significant that on the trial of a later indictment, where this very statement was furnished to the defense, there was a verdict of acquittal. This piece of evidence might well have been the last straw.

Conclusion

The several foregoing reasons for certiorari herein present questions of importance. They are of a type arising in other trials. Enough uncertainty and difference of opinion exist as to applicable law to render clarification desirable. So far as petitioner is concerned, the cumulative effect of the various challenged rulings was such as to be productive of an injust result and an unwarranted conviction.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

EDWIN M. KOSIK,
Of Counsel.

August 16, 1965.

APPENDIX A

Opinion of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14803

UNITED STATES OF AMERICA

v.

KNOX COAL COMPANY, ROBERT L. DOUGHERTY, AUGUST J. LIPPI, JOSEPHINE SCIANDRA AND LOUIS FABRIZIO

AUGUST J. LIPPI,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued October 8, 1964.

Before: KALODNER, GANEY and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 21, 1965)

By GANEY, *Circuit Judge.*

The Knox Coal Company ("Company") was indicted on March 10, 1961, along with four individuals named re-

spectively Robert L. Dougherty, Josephine Sciandra, Louis Fabrizio and August J. Lippi. The indictment contained seven counts. Six of them were based on violations of 26 U.S.C.A. § 7201, [1]; the other on a transgression of 18 U.S.C.A. § 371, the general conspiracy section of the Criminal Code. Count I in substance charged the Company alone with willfully attempting to evade and defeat a large part of the taxes due and owing by it for the fiscal year ended June 30, 1957, by filing and causing to be filed a false income tax return for that period when it knew that the tax due was understated therein by $80,445.45. Count II accused the four individuals with having conspired from on or about July 1, 1956, to September 12, 1957, (the date of the filing of the return) to commit the offenses of willful attempts to evade and defeat the corporate income taxes of the Company for the fiscal year ended with June 30, 1957. Count III charged the same four individuals with the substantive offense of willfully attempting to evade and defeat the payment by the Company of $80,445.45 in income taxes for the fiscal year ended June 30, 1957, by causing to be entered on the payroll records of the Company the names of persons who were not employees of the Company; causing funds of the Company to be paid in the form of wages to or in the name of those persons; causing to be entered on the books and records of the Company, and causing funds of the Company to be paid in the form of costs and expenses which they knew were not in fact costs and expenses of the Company; and causing the Company to claim falsely in its Federal income tax return for the fiscal year ended June 30, 1957, income tax deductions

[1] This section of the 1954 Internal Revenue Code provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to the other penalties provided by law, be guilty of a felony . . . ."

for those payments. Counts IV and V averred that Sciandra did willfully attempt to evade and defeat income taxes owed by her for the years 1956 and 1957. Counts VI and VII claimed that Fabrizio did also willfully attempt to evade and defeat a large part of his income taxes for the same years.

Lippi's motion to dismiss the indictment for alleged insufficiency was denied by the district court. Each of the defendants except Lippi filed a motion for severance. These motions were denied. The Company, Dougherty, Sciandra and Lippi plead not guilty to the charges against them. Fabrizio plead guilty to Counts III and VI. Immediately prior to trial, counsel for the Company withdrew from the case. Additionally, Counts II and VII, against Fabrizio, with the consent of the Government, were severed; and the Court, apprised of Dougherty's being hospitalized, stated it would proceed without him with no objection from either the Government or Dougherty's counsel. The Company, unrepresented by counsel, went to trial under Count I, Sciandra and Lippi under Counts II and III, and Sciandra under Counts IV and V. After a trial at Lewisburg, Pa., which began on April 2, 1961 and ended on April 13, the jury found the three defendants guilty on the counts under which they were tried.[2] Thereafter, Sciandra and Lippi filed motions for arrest of judgment, for judgment of acquittal and for a new trial. These motions were denied on December 20, 1962.[3] Lippi filed a motion for a new trial

[2] No attorney made any opening or closing address for the Knox Coal Company, no witnesses were examined for or called by the Company, nor did anyone make any objections, trial or post-trial motions on its behalf.

[3] The opinion has not been published.

on the grounds of newly discovered evidence. This motion was denied on October 10, 1963.[4]

The Company was fined $10,000. On Count II, Lippi was sentenced to pay a fine of $5,000 and to serve three years in prison. On Count III, imposition of sentence was suspended and he was placed on probation for three years to begin on his release from prison under Count II, "A condition of probation being that all deliquent taxes shall be paid." Sciandra and Fabrizio also received fines and sentences. With the consent of the district court, Counts II and VII were dismissed as to Fabrizio. Only Lippi has appealed.

I.

Lippi's first contention is that the district court erred in denying his motion for arrest of judgment as to Count II because it failed to allege a crime against the United States. That motion was based on the ground that the count fails to charge a crime against the United States because it does not, excluding the last paragraph under the overt acts, allege, as is asserted under Counts I and III, that a tax in excess of that reported by the Company was due the United States.

Happily, the rule that an indictment, to be sufficient, must contain all the elements of a crime "and sufficiently apprise the defendant of what he must be prepared to meet" is still a vital part of our Federal criminal jurisprudence. *Russell v. United States,* 369 U.S. 749, 763-766 (1962); *United States v. Deutsch,* 243 F. 2d 435 (C.A.3, 1957); *United States v. Tornabene,* 222 F. 2d 875, 878

[4] The opinion has not been published.

(C.A.8, 1955). At page 765 of the *Russell* case, supra, the Supreme Court states:

> "... 'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; ...' *United States v. Carll*, 105 U.S. 611, 612. 'Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.' *United States v. Hess*, 124 U.S. 483, 487. See also *Pettibone v. United States*, 148 U.S. 197, 202-204; *Blitz v. United States*, 153 U.S. 308, 315; *Keck v. United States* 172 U.S. 434, 437; *Morisette v. United States*, 342 U.S. 246, 270, n. 30. Cf. *United States v. Petrillo*, 332 U.S. 1, 10-11."

Section 7201 of the Internal Revenue Code of 1954 proclaims that any person who willfully attempts to evade or defeat any tax imposed by Title 26 in any manner shall be guilty of a felony. In *Sansone v. United States*, — U.S. — (March 29, 1965), the Court states (p.—): "[T]he elements of § 7201 are willfulness; the existence of a tax deficiency, *Lawn v. United States*, 355 U.S. 339, 361; *Spies v. United States*, [317 U.S. 492 (1943)] *supra*, at 496; and an affirmative act constituting an evasion or attempted evasion of the tax, *Spies v. United States, supra*."

In its introductory part, Count II names the Company as being a corporation with its business office at Exeter, Pa.; it identifies Dougherty as having been president of

the Company during the conspiracy; Fabrizio as secretary and treasurer; Sciandra as a stockholder; and Lippi as president of District 1, United Mine Workers of America. It then goes on to charge that these four individuals did unlawfully, knowingly and willfully conspire together and with other persons unknown to commit certain offenses against the United States, to wit:

> "(a) The offenses of wilful attempts to evade and defeat, corporate income taxes of Knox Coal Company for the fiscal year ended June 30, 1957, a felony, in violation of Section 7201 of Title 26 of the United States Code."

This quoted portion does not incorporate by reference or refer to any other part of the count or indictment. Of course, unless the charging part of a conspiracy count specifically refers to or incorporates by reference allegations which appear under the heading of the overt acts, resort to those allegations may not be had to supply the insufficiency in the charging language itself. *Joplin Mercantile Co. v. United States*, 236 U.S. 531, 535 (1915); *United States v. Deutsch*, supra, at 436. Also see *United States v. Apex Distributing Co.*, 148 F. Supp. 365, 370 (D.C. R.I. 1957). However, the failure of the charging part to declare that a tax in excess of that reported was due is not fatal. In a conspiracy count, the conspiracy is the gist of the offense. Where, as here, the purpose of the conspiracy is the performing of acts which are made an offense by another section of the Criminal Code, every element of that offense need not be set forth. A conspiracy count need not plead the substantive offense letter-perfect because the purpose of the conspiracy may have been accomplished even though such activity fell short of completing a substantive offense. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915).

Lippi also claims that the count does not fully and clearly set forth the purpose of the conspiracy. In *Pettibone v. United States,* 148 U.S. 197, the Supreme Court observes (p. 203):

> "A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted . . . that when the criminality of a conspiracy consists of an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment . . . ."

If Count II stated no more than that quoted in paragraph (a), though it restricts the charge to a single year, it would be insufficient. But the count does not stop there. It goes on to state that the Grand Jury further charges that the conspiracy was to be accomplished by the "means and method and in the manner following:". It was a part of the plan and conspiracy that false payroll records be created for the Company which would list as "corporate employees persons who would not, in fact, be employees of the corporation and who would perform no services for the corporation," and that funds of the Company would be "paid in the form of wages or salary payments to or in the name" of those persons, and that the Company on its payroll records and income tax returns for the fiscal year ended June 30, 1957, would claim Federal income tax deductions for wages or salaries paid and to be paid to or in the name of those persons. Then follows the listing of the overt acts in thirteen numbered paragraphs. The first four state that each of the four individual defendants respectively caused the name of a certain person to be listed

on the payroll records of the Company. The next eight assert that Dougherty and Fabrizio disbursed funds of the Company to or in the name of eight separate individuals. The last paragraph avers that Dougherty filed or caused to be filed a knowingly false Federal income tax return for the Company for the fiscal year ended June 30, 1957, wherein the tax due was understated by $80,445.45. What the Grand Jury further charges, Lippi argues, may not be considered as a part of the charging part of the indictment. This argument is without merit.

Another important aspect, Lippi says, in which this count is fatally defective is that it charges a conspiracy to commit "the offenses of wilful attempts"—both terms being averred in the plural. Of course it was not necessary for the count to assert an agreement to commit the offense of willful attempt in the plural. But we fail to see how Lippi was harmed by this form of assertion. A conspiracy count may allege a purpose to commit multiple substantive offenses, and it is not duplicitous if it does so. *Braverman v. United States,* 317 U.S. 49, 54 (1942). As has been adverted to earlier, in a conspiracy count, the conspiracy is the gist of the offense, and though the count charges an agreement to commit several crimes or several acts, each one of which may be the basis for an indictment, the count charges but one offense under 18 U.S.C. § 371.

The indictment contains all the elements of a crime under 18 U.S.C. § 371 and sufficiently apprised Lippi of what he was to meet; and in case any other proceedings are taken against him for a similar offense, the record shows with accuracy to what extent he may plead his conviction under Count II. For example, see *United States v. Jackson,* 344 F. 2d 158 (C.A.3, 1965). The trial court did not err in denying his motion in arrest of judgment.

II.

Lippi complains on three grounds that the trial court committed reversible error in denying his motion for a new trial. The first is the court's failure to instruct the jury to disregard certain declarations of an alleged co-conspirator made after the termination of the conspiracy. A brief summary of the pertinent facts shown by the Government in its case-in-chief, followed by some excerpts from the trial court's admonition and instructions to the jury about the statements in question will demonstrate, in our opinion, that they were properly admitted into evidence as far as Lippi is concerned, and are not to be considered as being prejudicial.

To prove the conspiracy involving Lippi, among others, the Government produced evidence to show that Lippi's relationship with the other three individually named defendants was more than appeared on the surface, and that he had received payments from the Company. This evidence showed the following: The Company was in the business of mining and selling coal. It maintained payroll and general fund checking accounts at The First National Bank of Exeter ("Bank"), Exeter, Pennsylvania, of which Lippi was either president or chairman of its board of directors and Dougherty was vice-president and a director from 1955 to about 1960. Checks issued by the Company were signed by Fabrizio and Dougherty. Although the Company's stock-book, as of December 18, 1950, showed Sciandra and Fabrizio as being the only stockholders and each owning 495 shares of the Class A stock, a trust agreement of the same date, signed by each of the individual defendants, lists the owners of that class of stock and the number of shares owned by each as follows: Sciandra, 280; Fabrizio, 330; and Lippi, 280. The trust agreement refers to these three as "Shareholders", and to Dougherty as

"General Manager". It recited that the parties were desirous of entering into an agreement concerning the disposition of their shares on the respective deaths of any one of them, and securing the continued services of Dougherty as general manager by granting him rights to purchase shares of the Company. Upon the death of any shareholder, the surviving shareholders and Dougherty, if he is in the employ of the Company as general manager, agree to purchase in equal portions the shares of the deceased shareholder to be applied to the purchase price. No shareholder was to sell his shares without first offering them for sale in equal portions to other shareholders. Thus, it can be seen that Lippi was a substantial shareholder in the Knox Coal Company while, at the same time, he was president of the unions in whose district the Company was operating. Pursuant to the trust agreement, each of the shareholders took out insurance in the amount of $25,000 on the life of each of the other two shareholders; Dougherty also obtained insurance in the same amount on each of the lives of the three shareholders. Up until 1957, the Company paid the cost of the annual premiums amounting to $10,851.72 on these policies.

Upon an examination of the Company's records for the years 1955 and 1956 by an agent of the Internal Revenue Service, the payment of the cost of the insurance premiums was declared by him to be actually a dividend payment by the Company in the year 1956 to the three shareholders. In addition, two recorded cash dividends were declared by the Company: $2,500 in 1956, and $4,000 in 1957. During his investigation, the agent came across two checks, one for $2,500 dated October 16, 1956, and the other for $4,000 dated January 16, 1957. Both of them were made out to cash and canceled, without their having been endorsed, by the Bank. There was no evi-

dence that these checks had been previously negotiated before they were presented to the Bank. One George J. Daileda, a former cashier at the Bank for many years and close associate of Lippi, testified that the latter had presented these checks to him for cashing at the Bank. Additionally, Lippi's Federal income tax return for the calendar year 1956 lists $6,117.52, which happens to be equal to the total of $2,500, the amount of the cash dividend just adverted to, and an amount equal to one-third of the annual cost of the premium payment paid by the Company in that year, $10,851.72 or $3,617.24. This further is indicative of the fact that Lippi was no stranger to the Company. His return for 1957 shows $4,000 as dividends received by him, without giving the source.[5,6]

For the fiscal year ending June 30, 1957, the Company included in its deductions for Federal income tax purposes the following disbursements totaling $161,702:[7]

(a) Wages and vacation payments	$131,582
(b) Drainage expenses	18,120
(c) Miscellaneous expenses	12,000

(a) The amount of $131,582 had been distributed by payroll check payments over the fiscal year to some 32

[5] Substantially this same evidence, with the exception of George Daileda's statements, was presented in a trial held at Wilmington, Delaware, in the United States District Court for the District of Delaware. See *United States v. Lippi*, 190 F. Supp. 640 (1961), and 193 F. Supp. 441 (1961).

[6] Lippi's counsel made a number of requests for points for charge. One of them, which the trial court adopted, contained the following sentence: "No corporation can by violating the law make any one of its stockholders who does not himself participate in that violation criminally liable therefor."

[7] This total was $200 more than the amount claimed to be overstated as deductions in the indictment.

people, a majority of whom were female, who performed no services for the Company. Some of them were children in their early teens. One of them was an ex-miner on pension, another was over seventy years of age. With one exception, those named had not been entered in the time-book, the information from which, along with the rate of pay, was the basis for making up the regular payroll. Some of the payments were substantial and approximated those ordinarily paid to a superintendent or foreman in the coal mining industry. The payroll sheets issued semi-monthly and monthly containing the names of these people were marked with four X's to distinguish them from the regular payroll sheets or those actually working for the Company as miners, clerks, etc. The names on these sheets were divided into four groups, those of Lippi, Dougherty, Sciandra and Fabrizio. The grouping could be easily observed from the location of the names on the records. Likewise, vacation payments were made to each group in identical amounts even though the number of persons in each group varied. When vacation payments were increased, each group received an identical increment. Some of the individuals received vacation payments even though their names had not been listed previously in the payroll sheets. The connection of each of the individual defendants with one of the four groups could be ascertained by his or her blood relationship or friendship to the people within that group. The persons in the group attributed to Lippi consisted of his married daughter, nephew, brother-in-law and personal secretary. Also, the wife of the latter, a life-long acquaintance, Mary Friday, who was a school principal, and two other persons who knew him. One of the latter was Carmelo Sciandra, no relation to the defendant herein, Josephine Sciandra.

Daileda testified that Lippi presented to him for cashing Company checks made out to his brother-in-law and to Carmelo, and that he presented for deposit to the account of Mary Friday, his life-long friend, twenty-one out of twenty-four checks made out to her. He also stated that he did not know Carmelo and that Lippi had given him a photograph of Carmelo so that he would be able to identify him in the event he was questioned about the checks made out to Carmelo. He also stated that when Lippi was on vacation for approximately six weeks, his secretary brought in the checks issued during that period and he (Daileda) set the cash aside in the Bank until Lippi returned. This is only partial evidence in the record showing an overwhelming amount of testimony connecting Lippi with Count II, the conspiracy count in the case. Further vacation payments were made to the various four groups and in all of the four groups the Government's Exhibit No. 158, which was admitted into evidence as a summary of the various payments made to alleged employees, showed for the fiscal year ended June 30, 1957, that, with a few exceptions, each one of them had been paid a total of $800, while the Company checks representing these payments were in varying amounts. This is clearly indicative that these payments were spurious, for it was highly improbable that each one of them would have received vacation payments in exact total amounts if they had been bona fide employees. Proof of the vacation payments were relevant under Count II, as well as under the other counts.

(b) The $18,120 for "drainage" expenses was paid out in 48 checks during the fiscal year ended June 30, 1957.

These so-called expenses were set forth in the Company's purchase journal but no corresponding invoices were found in the Company's records. The checks were issued at the rate of two each semi-monthly and monthly

period. Each time, one of them was made out to "Joseph Boccacini", and the other to "Louis J. Melosi". None of the working personnel at the Company appeared to know who these persons were. The Internal Revenue Service had no record of their having filed income tax returns for the years 1956 or 1957. According to the Company's records, Boccacini's address was the same as that of Lippi's married daughter, and Melosi's was identical to that of Lippi's nephew. Although the checks were in varying amounts, they invariably totaled $755 semi-monthly and $1,510 monthly. They were prepared by the Company's bookkeeper at the direction of Dougherty, and canceled by the Bank without their having been previously negotiated. Daileda also testified that it was Lippi who presented to him for cashing at the Bank the Boccacini and Melosi checks without their having been endorsed, and that he, Daileda, endorsed them by signing the payee's name.

(c) The disbursement of the $12,000 under the heading of "miscellaneous" expenses was by means of twelve $1,000 checks, each made out to "cash". They were issued monthly in the fiscal year ended June 30, 1957. No invoices corresponidng to these expenses appeared in the Company's records, nor did they, unlike the "drainage" expenses, appear in the purchase journal. The checks, without endorsement or having been negotiated before, had been canceled by the Bank. Proof of the same nature of the "drainage" and "miscellaneous" expenses was probative of the allegations under Counts I and III only, as "drainage" and "miscellaneous" expense payments were not included under the conspiracy charge in Count II.

Daileda also testified that Lippi likewise presented the twelve $1,000 checks, made out to "cash". His testimony was the only evidence in the case from which it could be reasonably inferred that Lippi caused or aided and abetted the disbursement of the twelve $1,000 checks under Count

III, and the only direct evidence implicating him with the "drainage" expense checks. If the defense could have effectively impeached Daileda in the eyes of the jury, the Government would not have been able to prove its case against Lippi under Count III. This witness was therefore subjected to broad searing cross-examination, during which the defense was not interrupted by the court or by objections on the part of the prosecution. On cross-examination, he admitted having given testimony at prior trials and to the Grand Jury and information to agents of the Internal Revenue Service which was either contradictory or did not correspond to the testimony he was presently giving on the witness stand. He also admitted that Lippi was instrumental in having him dismissed from his position at the Bank—after he had been employed there for some thirty-three years.

A Michael P. Malinak, an Internal Revenue Agent, testified that during his investigation of the Company's records for the fiscal year ended June 30, 1957, he came across the Boccacini and Melosi checks and the twelve $1,000 "cash" checks, and asked the Company's bookkeeper for some information about them. The latter referred him to Dougherty. Concerning his conversations with Dougherty, the agent testified:

> "Mr. Dougherty told me these checks were paid to Louis Melosi and Joseph Boccacini but that these gentlemen did not perform drainage work for the Knox Coal Company or any other services directly connected with the operation of the mine. He stated they did perform some services for the corporation, and he also stated that they were connected with the union in some manner." [8]

[8] There was no evidence that either Lippi or Sciandra were present when these statements of Dougherty were purportedly made, or that they assented to or authorized them. Dougherty was not arrested until March 23, 1961, thirteen days after the return of the indictment.

Lippi's counsel objected to this portion of the agent's testimony on the ground that it involved hearsay statements by one of the co-conspirators after the conspiracy had ended and therefore could only be considered against Dougherty. However, these statements evinced knowledge by Dougherty of a matter within the averments of Counts I and III, and, accordingly, in his capacity as president of the defendant Company, they were admissible against it under Count I since there was no objection on the part of the Company, the only one who could properly object on its part. The defendant, Lippi, has no cause for complaint concerning the admission into evidence of these statements by Dougherty for the most he could have insisted upon is that they not be used against him. The trial judge gave him that protection as shown by the following:

In response to the objection by Lippi's counsel to Dougherty's statements about the Boccacini and Melosi checks, the prosecuting attorney stated:

> "Mr. Dougherty, if the Court please, was at the time president of the Knox Coal Company, and as such was acting for the Knox Coal Company in dealing with the Government during an audit of the Knox Coal Company's affairs. The Company, of course, could speak only through its president, Mr. Dougherty, and we submit Mr. Dougherty's explanations are for himself and the Company, and therefore they are admissible.
>
> . . . . . .
>
> "The corporation is on trial, Your Honor, and Mr. Dougherty was its only authorized agent to speak for it. He spoke while he was employed as an officer and he spoke on a matter for the corporation."

When Sciandra's counsel joined in the objection, the trial court made the following admonition:

> "The jury will be instructed that this testimony has only application to the Knox Coal Company, and will have no bearing, no relation at all to the other two defendants."

Lippi argues that the purpose of the Government in offering the Dougherty statements quoted above into evidence was to implicate him under the guise of showing a case against the phantom Company defendant which he claims was not on trial but only nominally so. The Company, though unrepresented by counsel, was very much on trial. When a corporation is named as a defendant, it is always nominally so, because it can act only through its officers and agents.[9] If those having an interest in the Company did not insist on obtaining an attorney to represent it at the trial, it is no concern of the courts.

Regarding any claim of undue prejudice arising from the statements, we are not unmindful that there was a risk that the jury might transfer their knowledge of the statements received under Count I across the barrier of exclusion and use it in determining the guilt of Lippi under Count III as to which the statements were not admissible. See *Blumenthal v. United States*, 332 U.S. 539, 559 (1947). However, it is to be remembered that Lippi did not ask that his trial be severed from that of the Company and, further, that the Court reminded the jury at the time of the objection that the testimony had "no relation at all to the other two defendants." The only other two defend-

[9] See *New York Central & H. R. R. Co. v. United States*, 212 U.S. 481 (1909); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943); *Egan v. United States*, 137 F. 2d 369, 378-382 (9 Cir., 1943); *Steere Tank Line, Inc. v. United States*, 330 F. 2d 719, 721-722 (C.A.5, 1963).

ants on trial were Lippi and Sciandra. Later, in the Court's charge to the jury, the Court instructed the jury to the same effect.[10]

Agent Malinak also testified that in looking over the records of the Company he was struck by the number of feminine names—seven of them alone had the last name of Dougherty—on the payroll sheets. The bookkeeper told him the explanation would have to come from Dougherty. To the prosecuting attorney's question did Dougherty make any statement, the agent replied:

> "Yes, I asked him if there is any woman working on the premises of The Knox Coal Company, and he stated there were no woman working on the premises."

Despite the fact that this statement was about a matter involved in the first three counts, no objection was interposed to the question, nor a request made that the answer be restricted to the Company under Count I and Dougherty under Count II, and the trial court gave none at the time. If one is apprehensive that the admitting into evidence of the Dougherty statement about no women working on the Company's premises might be considered as error, it was harmless indeed in the face of other proof. As pointed out in *Lutwak v. United States*, 344 U.S. 460, 619 (1953): "In view of the fact that this record fairly shrieks the guilt of the parties, we cannot conceive how this one admission could have possibly influenced this jury to reach an improper verdict. A defendant is entitled to a fair trial but

[10] On this point the trial court charged: "Declarations or admissions of a defendant which are made after the conspiracy came to an end, however, or after the defendant in question withdrew from it, may be considered by you only in determining his guilt or innocence and are not to be considered as against any defendant who was not present when they were made."

not a perfect one. This is a proper case for the application of Rule 52(a) of the Federal Rules of Criminal Procedure. We hold the error to be harmless." Also see *Delli Paoli v. Unted States*, 352 U.S. 232, 239-243 (1957). It seems obvious counsel's failure to object here was that so much evidence had already been introduced into the record as to the spuriousness of the wage and vacation payments to certain persons under Counts II and III, that this statement was merely cumulative and would have little or no effect on the determination of Lippi's guilt under those counts. Moreover, it has been held that where, as here, no objection is entered or instructions, cautionary or otherwise, are requested, any post-trial objection to the admissibility of the testimony is waived. See *Rossetti v. United States*, 315 F. 2d 86, (C.A.2, 1963).

III.

The second ground for his contention that the trial court committed reversible error in refusing to grant him a new trial concerns references in the presence of the jury of Lippi's failure to testify. Section 3481 of Title 18 declares that a defendant's choice in not asking to be a witness shall not create any presumption against him. Comment, especially of the hostile variety, in the presence of a jury upon a defendant's choice not to testify on his own behalf is forbidden. *Wilson v. United States*, 149 U.S. 60, 65 (1893); *Regan v. United States*, 157 U.S. 301, 305 (1895). When comment is made upon defendant's election not to take the witness stand, the trial court should condemn such reference and "express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant." *Wilson v. United States*, supra, at 67. The refusal of the trial court, after being requested by a de-

fendant, to charge that his failure to testify in his own behalf does not create any presumption against him is plain error. *Bruno v. United States*, 308 U.S. 287 (1939); *Helton v. United States*, 221 F. 2d 338 (C.A.5, 1955).

The following concerns the facts:

(a) Against the advice of her attorney, Sciandra testified on her own behalf. In his summation, her attorney informed the jury as follows:

> "Now this defendant took the stand upon her own insistence. She says, 'I want to tell these jurors what happened.' You saw her there . . . .
>
> ". . . This woman does not know what questions she is going to be asked, and believe me for a lawyer to [put] a defendant on the stand, unless they themselves believe they are not guilty, don't do it, but she says she wanted to tell these people, and she did."

And a few minutes later he again mentioned the fact that she took the stand in the following context:

> "Now, what did Mrs. Sciandra do? Why is she here? Did she hide anything? Now she got on the stand. She admitted to you that she put these people, her family, and she asked them to put them on the payroll . . . ."

In his entire summation, he did not mention Lippi's name nor make any expressed or implied reference to him regarding his not taking the stand. Lippi's counsel did not interpose any objections to the remarks made by Sciandra's counsel at the time they were made or at the close of the summation nor ask for a mistrial. As a matter of fact, in his summation which preceded that of Sci-

andra's counsel, Lippi's counsel had occasion to emphasize the fact that "Mrs. Sciandra took the stand." Our denial of Mr. J. Tom Grimmett's petition for rehearing in *United States v. Grimmett*, 331 F. 2d 703 (C.A. 3, 1964), cert. denied, 377 U.S. 993, adequately disposes of Lippi's contention that he was prejudiced by the remarks of co-defendant's counsel.

(b) At the beginning of his rebuttal, the attorney for the prosecution informed the jury that he was going to answer some statements made by the attorneys for Lippi (Mr. Edwin M. Kosik) and Sciandra. At this point, the trial court interrupted him with the following reminder within the hearing of the jury: "I don't think there is any rebuttal of Mr. Kosik's case. He [Lippi] didn't take the stand. Doesn't that give him the final closing? You do have rebuttal as to Mrs. Sciandra. Don't you agree?" To which he answered, "Yes, I believe that is so because he didn't take the stand. What the judge has just remarked, that since Mr. Lippi didn't take the stand that we will be limited in our rebuttal remarks to what [Sciandra's attorney] had to say. So I will be more brief than I planned." On the basis of these remarks, Lippi's counsel did not seek a mistrial or request that customary instructions be given to offset them.

If a defendant may waive the protection of 18 U.S.C. § 3481 by testifying, he may do so by failing to object to the remarks made by the prosecuting attorney concerning his not taking the stand. Such remarks are not plain error, especially when the jury was adequately admonished by the trial court: *Jackson v. United States*, 102 Fed. 473, 487 (9 Cir. 1900); and it was made aware that he did not testify by the fact that one of the other defendants took the stand. *Wright v. United States*, 108 Fed. 805, 811-813 (5 Cir. 1901).

(c) Without being requested to do so by Lippi, the trial court included the following instruction in its charge to the jury:

> "Now, the defendant, Mr. Lippi, did not take the stand. You will draw no inference from the fact that he did not take the stand. That is his right and his privilege. There is no burden on him to prove his innocence. By his plea of 'not guilty' he has made a complete denial of the charge. As indicated before, the Government has the burden of proving his guilt beyond any reasonable doubt.
>
> "The law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify."

This admonition was repeated by the court prior to his dismissal of the alternate jurors. Lippi did not ask for a mistrial after these instructions were given.

Under the circumstances, the trial court did all it could short of declaring a mistrial to offset the remarks in question. *Nobile v. United States,* 284 Fed. 253 (3 Cir. 1922), *Poliafico v. United States,* 237 F. 2d 97, 114-115 (C.A. 2, 1957), cert. den. 352 U.S. 1025; *United States v. Aqueci,* 310 F. 2d 817, 830-831 (C.A.2, 1962); *United States v. DiCarlo,* 64 F. 2d 15, 18 (2 Cir. 1933); *Robilio v. United States,* 291 Fed. 975, 985-986 (6 Cir. 1923); 12 Cyc. of Fed. Proc. (3d ed.) § 48.181.

Moreover, the remarks of the prosecuting attorney and the instructions by the trial court could in no wise be construed as holding that Lippi's silence was evidence of guilt. See *Griffin v. California,* — U.S. —, (April 28, 1965).

IV.

At the close of the direct examination of Daileda, Lippi's counsel moved the trial court, pursuant to 18 U.S.C.A. § 3500(b) of the Jencks Act, to instruct the prosecution to provide him with statements previously made by Daileda to the United States. Special Agent Reuben A. Gershuni of the Intelligence Division of the Internal Revenue Service had been assigned to investigate the affairs of the Knox Coal Company. During this investigation, he made a handwritten memorandum of an oral interview with Daileda on October 15, 1958, regarding Company checks presented to the Bank. This memorandum was given to defense counsel for their inspection and use. The prosecution admitted that in other cases, not pertinent to the one being tried, FBI agents had also taken statements of Daileda. On the prosecution's assurance that these statements had no pertinency to the subject matter of the testimony given by Daileda on direct examination, the defense waived the presentation of those statements for the in camera inspection by the trial court.

According to the Gershuni memorandum, Daileda stated that it was Carmelo Sciandra, then deceased, who had presented the "drainage" and "miscellaneous" expense checks and also the dividend checks made out to "cash" to him at the Bank, and that Carmelo had been introduced to him by one John Sciandra, also deceased.

Daileda had testified at two previous trials in which Lippi was a defendant. One in Easton, Pennsylvania, the other in Wilmington, Delaware. He also testified before the Federal Grand Jury for the Middle District of Pennsylvania. At the previous trials, Daileda stated on the witness stand that he could not remember who presented the dividend checks to him for cashing. During the trial in question, the prosecuting attorney assured the defense, who possessed the transcript of the prior trials, that

Daileda's testimony before the Grand Jury to the extent it was germane to the subjects on which he had testified at the present trial was essentially the same as his testimony at the Wilmington trial. With this assurance the defense waived the production and inspection of the Grand Jury minutes.

On cross-examination the defense elicited from Daileda without reservation that he had lied at the prior trials and before the Grand Jury regarding his knowledge of the identity of the person who presented the checks to him at the Bank, and that the testimony given by him on direct examination was true. He also admitted that the information that he gave to Agent Gershuni on October 15, 1958, about Carmelo was false. Neither the trial court nor the defense asked Daileda if he had given any other statements relating to the subject matter as to which he had testified on direct examination to agents of the Government. Nor did the defense request the trial court to do so.

After the trial of the present case had been concluded, a subsequent trial was had in which Lippi was defendant but which involved the Newport Excavating Company. There, the Government presented to Lippi's counsel a memorandum dated May 8, 1959, and prepared by Special Agent Anatole G. Richman during his investigation of the Newport Excavating Company. Lippi's counsel did not know of the existence of that memorandum until that time. It consisted of 231 questions put to Lippi and his answers to them. Question No. 202, the only one having any pertinency to the Daileda testimony, is as follows: "Did Mr. Lippi ever bring in anyone else's check other than his personal check?" Daileda's answer was recorded as "No." It is the Government's failure to have produced this memorandum pursuant to his motion under 18 U.S.C. § 3500(b) at the trial involved here that Lippi claims was prejudicial to him because he was prevented from using it to impeach Daileda at that trial. This was the basis for his filing

of his motion under Rule 33 of the Federal Rules of Criminal Procedure for a new trial on the ground of after-discovered evidence—such evidence being the May 8, 1959 memorandum. The memorandum was made available for the district court which held there was no prejudice to the defendant and denied the motion for a new trial.

When the defense moves pursuant to the Jencks Act to have the prosecution produce prior statements of a witness after he has testified, the burden is on the trial court to ask the prosecution whether such statements exist. If statements are produced, it is up to the trial court, not the jury, to determine, subject to review on appeal, whether they come within the definition of 18 U.S.C. § 3500 and "relates to the subject matter as to which the witness has testified."[11] Once this question has been determined, they should be given to the defense for its "examination and use." "[W]hether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself." *Scales v. United States*, 367 U.S. 203, 258 (1961). Also see *Killian v. United States*, 368 U.S. 231, 243 (1961); *United States v. Birnbaum*, 337 F. 2d 490, 497-498 (C.A.2, 1964). The Act "does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced." *Palermo v. United States*, 360 U.S. 343, 353 (1960); *Clancy v. United States*, 365 U.S. 312, 316 (1961); *Campbell v. United States*, 373 U.S. 487, 493 n. 7 (1963); *United States v. Berry*, 277 F. 2d 826 (C.A.7, 1960). When the statements are admitted into evidence, the prosecution may not rehash the question of their relevancy before the jury, but is free to argue within the bounds of reason the relative weight which it thinks the jury should give to them. Of

[11] It has been said that the district court's determination is subject to the clearly erroneous rule. But see *Williams v. United States*, 338 F. 2d 286, 289 (C.A. D.C., 1964).

course the defense may waive the production of all such documents or some of them. Here, Lippi's counsel agreed not to ask for the production of any statements as to which the prosecution assured him had no bearing on the testimony given by Daileda on direct examination. There was no showing that the United States Attorney knew of the existence of this statement at the time of the trial of this case and since it was given to an Agent of the Government in the investigation of a wholly different matter, we cannot say that it came within the framework of the defendant's request at the time of this trial. This for the reason that an examination of the whole record indicates quite clearly that the checks presented to Daileda by Lippi in the Newport Excavating Case were those involving that company and, further, at the very beginning of the statement taken by Agent Richman, in which this question appears, Richman told him he was requested to appear for the taking of testimony in order to answer questions in connection with the Newport Excavating Company. The question here posed upon which the defendant relies for a reversal of the judgment of the lower court, when read in context shows it was in relation not to the Knox Coal Company but to an entirely different investigation concerning the Newport Excavating Company. To hold the United States Attorney responsible for not handing over this memorandum brought out in a case tried later than the one he was trying and concerning a different subject matter, would be widening the ambit of the Jencks Act out of all proportion to the ends it was sought to protect.

The district court in its opinion stated that it would be extremely doubtful whether the question and answer about checks issued by the Newport Excavating Company could be applied to those issued by the Knox Coal Company. It also stated that if the statement were to be used by the defense for impeaching the credibility of Daileda, the complete memorandum would undoubtedly have been

excluded because it "is of such extremely cumulative nature and of doubtful applicability to the issue of credibility that it is too trivial to justify a new trial. It then went on to hold that the Supreme Court's comment in *Rosenberg v. United States*, 360 U.S. 367, 371 (1959) is applicable to Lippi's request for a new trial. When the *Rosenberg* case was in this court, we held that even though the trial court's withholding from the defense a letter written to the prosecutor by a witness just before trial was error, the defense suffered no prejudice from that error. In affirming "the judgment on which the Court of Appeals based its conclusion that the failure to require production of the letter was empty of consequences", the Supreme Court said: "Since the same information that would have been afforded had the document been given to the defendant was already in the possession of the defense by way of the witness' admission while testifying, it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the letter." Also see *Killian v. United States*, supra, 368 U.S. at 243-244, and *Ogden v. United States*, 303 F. 2d 724, 737-738 (C.A.9, 1962).

Therefore even if we give Lippi the benefit of the doubt and assume that the district court erroneously held that the statement need not have been given to the defense at the trial we agree on the authority of the *Rosenberg* and *Killian* cases, supra, that it did not commit reversible error in denying Lippi's second motion for a new trial.

Accordingly, the judgment of conviction and sentence and the orders denying a new trial of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,803

UNITED STATES OF AMERICA,

vs.

KNOX COAL COMPANY, ROBERT L. DOUGHERTY, AUGUST J. LIPPI, JOSEPHINE SCIANDRA and LOUIS FABRIZIO

AUGUST J. LIPPI,

Appellant

(D.C. Criminal No. 13579)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: KALODNER, GANEY and FREEDMAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the District Court, filed January 20, 1964, be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

June 21, 1965

APPENDIX C

Indictment

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 13579 Criminal

Vio. 26 U. S. C. 7201
18 U. S. C. 371

UNITED STATES OF AMERICA

vs.

KNOX COAL COMPANY,
ROBERT L. DOUGHERTY,
AUGUST J. LIPPI,
JOSEPHINE SCIANDRA, and
LOUIS F'ABBIZIO

THE GRAND JURY CHARGES:

COUNT I

That on or about the 12th day of September, 1957, in the Middle District of Pennsylvania,

Knox Coal Company,

Luzerne County, Pennsylvania, a corporation, did wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by the said corporation to the

United States of America for the fiscal year ending June 30, 1957, by filing and causing to be filed with the District Director of Internal Revenue, at Scranton, Pennsylvania, a false and fraudulent tax return wherein it alleged that its taxable income for the said fiscal year was the sum of $8,929.11 and that the total amount of tax due thereon was the sum of $2,678.73, whereas, as it then and there well knew, the taxable income of the corporation for the said fiscal year was the sum of $170,431.11, upon which taxable income the corporation owed to the United States of America a total tax of $83,124.18.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C., Section 7201.

THE GRAND JURY FURTHER CHARGES:

COUNT II

(1) That at all times hereinafter mentioned Knox Coal Company, (hereinafter referred to as Knox), was a Pennsylvania Corporation with its business office being located at Exeter, Luzerne County, Commonwealth of Pennsylvania.

(2) That from on or about May 1, 1954 to and including August 15, 1958, Robert L. Dougherty, late of 322 Monument Avenue, Wyoming, Pennsylvania, was President of Knox.

(3) That at all times hereinafter mentioned August J. Lippi, late of 7 Bennett Street, Exeter, Pennsylvania, was President of District 1, United Mine Workers of America.

(4) That at all times hereinafter mentioned Josephine Sciandra, late of 1308 Wyoming Avenue, Exeter, Pennsylvania, was a stockholder in Knox.

(5) That from on or about May 1, 1954 to and including August 15, 1958, Louis Fabrizio, late of 10 Stout Street, Yatesville, Pennsylvania, was Secretary and Treasurer of Knox; and from on or about August 16, 1958, Louis Fabrizio, was President of Knox.

That on or about the 1st day of July, 1956, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including September 12, 1957, and at times thereafter in the Middle District of Pennsylvania, and in other judicial districts of the United States,

Robert L. Dougherty,
August J. Lippi,
Josephine Sciandra,
and
Louis Fabrizio,

sometimes hereinafter called the defendants, did unlawfully, knowingly, wilfully and feloniously plan, conspire, combine, confederate and agree together, with each other, and with divers others persons to the Grand Jurors unknown, to commit certain offenses against the United States, to wit:

(a) The offenses of wilfull attempts to evade and defeat, corporate income taxes of Knox Coal Company for the fiscal year ended June 30, 1957, a felony, in violation of Section 7201 of Title 26 of the United States Code.

THE GRAND JURY FURTHER CHARGES:

That said unlawful combination, conspiracy, confederation and agreement was to be accomplished by the means and method and in the manner following:

(1) It was a part of the plan and conspiracy that false and fraudulent payroll records for Knox Coal Company

be created which would list as corporate employees persons who would not, in fact, be employees of the corporation and who would perform no services for the corporation.

(2) It was, further, a part of the plan and conspiracy that funds of Knox Coal Company be paid in the form of wage or salary payments to or in the names of persons who would not, in fact, be employees of Knox Coal Company and who would perform no services for Knox Coal Company.

(3) It was further, a part of the plan and conspiracy that Knox Coal Company on its payroll records and income tax returns for the fiscal year ended June 30, 1957, would claim Federal income tax deductions for wages or salaries paid and to be paid to or in the names of persons who would not in fact be employees of Knox Coal Company and who would perform no services for Knox Coal Company.

The said defendants and conspirators in furtherance of and for the purpose of carrying into execution the aforesaid plan, combination, conspiracy, confederation and agreement, did and performed the following and other overt acts:

(1) On or about August 15, 1956, Robert L. Dougherty caused to be entered on the payroll records of Knox Coal Company the name of Ellen M. Dougherty.

(2) On or about July 15, 1956, Josephine Sciandra caused to be entered on the payroll records of Knox Coal Company the name of John Sciandra, Jr.

(3) On or about August 15, 1956, Louis Fabrizio caused to be entered on the payroll records of Knox Coal Company the name of Carmine Fabrizio.

(4) On or about February 15, 1957, August J. Lippi, caused to be entered on the payroll records of Knox Coal Company the name of Ladio J. Savelli.

(5) On or about July 15, 1956, Robert L. Dougherty and Louis Fabrizio disbursed funds of Knox Coal Company to or in the name of Ann M. Dougherty.

(6) On or about July 15, 1956, Robert L. Dougherty and Louis Fabrizio disbursed funds of Knox Coal Company to or in the name of Mary Rossi.

(7) On or about July 15, 1956, Robert L. Dougherty and Louis Fabrizio disbursed funds of Knox Coal Company to or in the name of Eleanor Malacco.

(8) On or about January 31, 1957, Robert L. Dougherty and Louis Fabrizio disbursed funds of Knox Coal Company to or in the name of Joan Ochreiter.

(9) On or about April 30, 1957, Robert L. Dougherty and Louis Fabrizio disbursed funds of Knox Coal Company to or in the name of Margaret M. Dougherty.

(10) On or about May 15, 1957, Robert L. Dougherty and Louis Fabrizio disbursed funds of Knox Coal Company to or in the name of Jane Rossi.

(11) On or about April 30, 1957, Robert L. Dougherty and Louis Fabrizio disbursed funds of Knox Coal Company to or in the name of John Sciandra, Jr.

(12) On or about April 30, 1957, Robert L. Dougherty and Louis Fabrizio disbursed funds of Knox Coal Company to or in the name of Dominick Zurla.

(13) On or about September 12, 1957, Robert L. Dougherty filed or caused to be filed with the District Director, Internal Revenue, at Scranton, Pennsylvania, a Federal income tax return for Knox Coal Company for the fiscal

year ended June 30, 1957, which was wilfully and knowingly false and fraudulent and wherein it was stated that the corporation had a taxable income for the said fiscal year ended June 30, 1957, of $8,929.11, and that the amount of tax due and owing thereon was $2,678.73, whereas corporate taxable income for the said fiscal year was $170,431.11, upon which said taxable income the corporation owed to the United States of America an income tax of $83,124.18.

In violation of Title 18 U. S. C. Section 371.

THE GRAND JURY FURTHER CHARGES:

COUNT III

That during the fiscal year beginning July 1, 1956 and ending June 30, 1957, and thereafter, Robert L. Dougherty, late of Wyoming, Pennsylvania, August J. Lippi, late of Exeter, Pennsylvania, Josephine Sciandra, late of Exeter, Pennsylvania, and Louis Fabrizio, late of Yatesville, Pennsylvania, hereinafter sometimes called the defendants, did, in the Middle District of Pennsylvania and within the jurisdiction of this Court, wilfully attempt to evade and defeat a large part of the income taxes due and owing by Knox Coal Company, Exeter, Luzerne County, Pennsylvania, a Pennsylvania Corporation, to the United States of America, for the fiscal year ended June 30, 1957, by:

(1) Causing to be entered on the payroll records of Knox Coal Company the names of persons who were not in fact employees of Knox Coal Company and who performed no services for Knox Coal Company, as the defendants then and there well knew; and

(2) Causing funds of Knox Coal Company to be paid in the form of wage or salary payments to or in the name of

persons who were not in fact employees of Knox Coal Company and who performed no services for Knox Coal Company, as the defendants then and there well knew; and

(3) Causing the Knox Coal Company to claim falsely through its payroll records and in its Federal income tax return for the fiscal year ended June 30, 1957, filed with the District Director of Internal Revenue, at Scranton, Pennsylvania, a Federal income tax deduction for wages or salaries paid by Knox Company to persons who were not in fact, employees of Knox Coal Company and who performed no services for Knox Coal Company, all of which the defendants then and there well knew; and

(4) Causing to be entered on the books and records of Knox Coal Company costs and expenses which were not in fact costs and expenses of Knox Coal Company, as the defendants then and there well knew; and

(5) Causing funds of Knox Coal Company to be paid in the form of costs and expenses which were not in fact costs and expenses of Knox Coal Company, as the defendants then and there well knew; and

(6) Causing the Knox Coal Company to claim falsely through its records and in its Federal income tax return for the fiscal year ended June 30, 1957, filed with the District Director of Internal Revenue, at Scranton, Pennsylvania, in the Middle District of Pennsylvania and within the jurisdiction of this Court, a Federal income tax deduction for costs and expenses which were not in fact costs and expenses of Knox Coal Company, all of which the defendants then and there well knew;

all for the purpose of concealing and understating taxable income of Knox Coal Company for the fiscal year ended June 30, 1957, upon which said understated taxable

income, as the defendants then and there well knew, there was due and owing to the United States of America, an additional income tax of $80,445.45.

In violation of Title 26 U. S. C., Section 7201.

THE GRAND JURY FURTHER CHARGES:

COUNT IV

That on or about the 26th day of March, 1957, in the Middle District of Pennsylvania,

Josephine Sciandra,

late of 1308 Wyoming Avenue, Exeter, Luzerne County, Pennsylvania, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by her to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue, at Scranton, Pennsylvania, a false and fraudulent income tax return wherein she stated that her taxable income for said calendar year was the sum of $6000.50 and that the amount of tax due and owing thereon was the sum of $1,227.11, whereas, as she then and there well knew, her taxable income for the said calendar year was the sum of $33,078.50, upon which said taxable income she owed to the United States of America an income tax of $13,944.87.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C. Section 7201.

THE GRAND JURY FURTHER CHARGES:

COUNT V

That on or about the 27th day of March, 1958, in the Middle District of Pennsylvania,

Josephine Sciandra,

late of 1308 Wyoming Avenue, Exeter, Luzerne County, Pennsylvania, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by her to the United States of America for the calendar year 1957, by filing and causing to be filed with the District Director of Internal Revenue, at Scranton, Pennsylvania, a false and fraudulent income tax return wherein she stated that her taxable income for said calendar year was the sum of $14,311.44 and that the amount of tax due and owing thereon was the sum of $3,704.28, whereas, as she then and there well knew, her taxable income for the said calendar year was the sum of $57,053.69, upon which said taxable income she owed to the United States of America an income tax of $30,203.40.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C. Section 7201.

THE GRAND JURY FURTHER CHARGES:

COUNT VI

That on or about the 15th day of July, 1957, in the Middle District of Pennsylvania,

Louis Fabrizio,

late of 10 Stout Street, Yatesville, Luzerne County, Pennsylvania, who during the calendar year 1956 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and

his wife to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue at Scranton, Pennsylvania, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $47,948.39 and that the amount of tax due and owing thereon was the sum of $18,299.27, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $65,539.74 upon which said taxable income there was owing to the United States of America an income tax of $27,941.43.

In violation of Section 7201, Internal Revenue Code; 26 United States Code, Section 7201.

THE GRAND JURY FURTHER CHARGES:

COUNT VII

That on or about the 14th day of April, 1958, in the Middle District of Pennsylvania,

Louis Fabrizio,

late of 10 Stout Street, Yatesville, Luzerne County, Pennsylvania, who during the calendar year 1957 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957, by filing and causing to be filed with the District Director of Internal Revenue at Scranton, Pennsylvania, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their taxable income for said calendar year was the sum of $24,242.66 and that the amount of tax due and owing thereon was the sum of $6,740.74, whereas, as he then and there well knew, their joint tax-

able income for the said calendar year was the sum of $54,031.49 upon which said taxable income there was owing to the United States of America an income tax of $21,203.47.

In violation of Section 7201, Internal Revenue Code; 26 United States Code, Section 7201.

A True Bill.

/s/ Thomas Gemmel
Foreman

Dated: Mar 10 1961

/s/ Daniel H. Jenkins
United States Attorney

Certified from the record

Date Mar 10 1961
T. H. Campion, Clerk

Per Kenneth Mulholland
Deputy Clerk.

APPENDIX D

Statutes and Rules Cited

18 U. S. Code Sec. 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U. S. Code Sec. 3481:

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

18 U. S. Code Sec. 3500(b):

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

26 U. S. Code Sec. 7201:

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the pay-

ment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Rule 7(c), Fed. Rules Crim. Proc.:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation if the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for the dismissal if the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 12(b-2), Fed. Rules Crim. Proc.:

* * * Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Rule 33, Fed. Rules Crim. Proc.:

The court may grant a new trial to a defendant if required in the interest of justice.

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Delli Paoli v. *United States*, 352 U.S. 232 — 10

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 466

AUGUST J. LIPPI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 31–57) is reported at 347 F. 2d 33. Memorandum opinions by the trial court (R. 36a–54a)[1] denying petitioner's motions (1) in arrest of judgment, and for acquittal or new trial in the alternative, and (2) for a new trial on the grounds of newly discovered evidence, were not reported.

[1] "R.__a" references are to petitioner's appendix in the court of appeals; "R.__b" references are to respondent's appendix in the court of appeals; "Tr." to pages of the typed transcript lodged with the Clerk; "Ex." to original exhibits lodged with the Clerk.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1965 (Pet. 58). On July 19, 1965, Mr. Justice White extended to August 20, 1965, the time for filing a petition for a writ of certiorari. The petition was filed August 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conspiracy count of the indictment adequately pleaded the felony which was its object.

2. Whether, in a joint criminal tax trial of a corporation and individual defendants, post-conspiracy statements made to a federal investigator by the corporation's president can be admitted against the corporation under clear limiting instructions.

3. Whether reversible error inescapably occurs despite clear instructions to the jury where, during a colloquy on a procedural point, reference is made to the fact that a defendant has not taken the stand.

4. Whether the government's inadvertent failure to discover and furnish petitioner with one of a number of prior contradictory answers by a government witness required a new trial where the witness admitted on cross-examination that he had on several occasions given contradictory testimony on the same subject.

STATUTES INVOLVED

18 U.S.C.:

SEC. 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

SEC. 3500 (as added by Act of September 2, 1957, P.L. 85-269, 71 Stat. 595) *Demands for production of statements and reports of witnesses*

* * * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. [26 U.S.C. 7201.]

STATEMENT

On March 10, 1961, an indictment in seven counts was returned in the Middle District of Pennsylvania, naming petitioner, two officers and one stockholder of the Knox Coal Co. and the corporation as defendants (Pet. 59–69). Count one charged the corporation with willfully attempting to defeat and evade its income taxes for its fiscal year ending June 30, 1957, in violation of 26 U.S.C. 7201. Count two identified petitioner as president of United Mine Workers, District 1, and charged that he had violated 18 U.S.C. 371 by conspiring with the other three individuals to defeat and evade the corporation's 1957 taxes in violation of 26 U.S.C. 7201. Count three charged petitioner and the other three individuals with willfully attempting to defeat and evade the corporation's 1957 taxes in violation of 26 U.S.C. 7201. The remaining counts did not name petitioner.

Petitioner was tried jointly with the corporation

and Josephine Sciandra, a stockholder. The jury found all three guilty as charged. Petitioner was sentenced to imprisonment for three years and a fine of $5,000 on count two. Sentence on count three was suspended and petitioner was put on probation for three years. (R. 34a.)

Petitioner's interest in the Knox Coal Co. was not recorded in the corporation's stock book (Govt. Ex. 142) but a stockholders' trust agreement (Govt. Ex. 150-A) recited that petitioner owned 31% of the outstanding stock. Moreover, the evidence demonstrated that the corporation paid petitioner's insurance premiums (Tr. 724) and that he cashed dividend checks issued by the corporation to cash (Tr. 825).

The Knox Coal Co. took deductions on its 1957 tax return for the following expenses which the evidence shows it had not actually incurred (Govt. Exs. 157-159):

(1) Wages and salaries	$131,582
(2) Miscellaneous expenses	12,000
(3) Drainage expense	18,120

A former bank cashier, George Daileda, testified that the checks in the last two categories (some of which were made out to cash and some to third party payees) were cashed, without endorsement, by petitioner at the First National Bank of Exeter, of which petitioner was then an official. (Tr. 815, 817-818.)

The checks in the first category were distributed to some thirty-two persons (Govt. Ex. 158) connected by various relationships with either petitioner or the other individual defendants, including numerous

women and children, an absent soldier, elderly, retired miners, and professional teachers (Tr. 364, 358, 423, 448, 377, 301, 218, 289, 311, 324, 338, 346, 1010, 1011). The names of these people were separated from those of the regular employees on the payrolls; the total payments to the group related to each of the four individual defendants were approximately equal in amount (Govt. Ex. 158), the existence of any services rendered by these people was unknown to the company superintendents or office personnel (Tr. 26ff, 135ff.), and their performance of service was not substantiated by the "time books" normally used to record miners' services (Tr. 144, 147). (See also Tr. 229, 239, 248, 315, 324, 386, 424, 450, 494, 504.) Those payees who were in petitioner's group included his daughter, his nephew, his secretary, his secretary's wife, his brother-in-law, and three acquaintances (Tr. 364, 358, 423, 448, 377, 301, 398, 819). Petitioner cashed checks issued to at least three of them (Tr. 819, 822, 827). On the basis of this evidence the court below characterized these purported "wage" payments as "spurious" (Pet. 43).

ARGUMENT

1. Petitioner's contention that the indictment failed to charge the purpose of the conspiracy is refuted by a cursory scanning of count two which, after identifying the conspirators, alleged (Pet. 61) that they conspired

> * * * to commit certain offenses against the United States, to wit:
>
> (a) The offenses of wilfull attempts to evade and defeat, corporate income taxes of Knox

Coal Company for the fiscal year ended June 30, 1957, a felony, in violation of Section 7201 of Title 26 of the United States Code.

The Grand Jury Further Charges:

That said unlawful combination, conspiracy, confederation and agreement was to be accomplished by the means and method and in the manner following:

(1) It was a part of the plan and conspiracy that false and fraudulent payroll records for Knox Coal Company be created which would list as corporate employees persons who would not, in fact, be employees of the corporation and who would perform no services for the corporation.

(2) It was, further, a part of the plan and conspiracy that funds of Knox Coal Company be paid in the form of wage or salary payments to or in the names of persons who would not, in fact, be employees of Knox Coal Company and who would perform no services for Knox Coal Company.

(3) It was further, a part of the plan and conspiracy that Knox Coal Company on its payroll records and income tax returns for the fiscal year ended June 30, 1957, would claim Federal income tax deductions for wages or salaries paid and to be paid to or in the names of persons who would not in fact be employees of Knox Coal Company and who would perform no services for Knox Coal Company.

Thirteen overt acts were then alleged, of which the last was filing a fraudulent corporation tax return understating taxable income by $161,502, and tax by $80,445.45.

Petitioner cites *Pettibone* v. *United States,* 148 U.S. 197, where the Court found that the indictment failed adequately to allege the defendant's purpose. The instant indictment not only clearly alleges a conspiracy to willfully attempt to evade and defeat corporation taxes, but also describes at length the means to be employed.

The precision and detail required in indictments for substantive offenses are not necessary in charging conspiracy to commit those substantive offenses. *Wong Tai* v. *United States,* 273 U.S. 77, 80–81. The tax deficiency ultimately resulting was entirely speculative until the return was prepared, and the conspiracy would have been committed even if the substantive crime contemplated fell short of completion. *United States* v. *Rabinowich,* 238 U.S. 78, 86.

The use of plurals ("attempts" and "offenses") in stating the purpose of the conspiracy in paragraph (a), *supra,* apparently was inadvertent, as the stated purpose immediately descends to the singular by use of the phrase "a felony." If the plural was intended, it is pertinent to note that a conspiracy count is not duplicitous if it alleges a purpose to commit several substantive offenses. *Braverman* v. *United States,* 317 U.S. 49, 54. However, only one substantive attempt to evade was proved. At most, there was a trivial variance which in no way caused surprise or deprived petitioner of protection against further prosecution for the same offense.

2. When the case was called for trial on April 2, 1962, one defendant entered a guilty plea, and defendant Robert L. Dougherty (who was president of the Knox Coal Co.) obtained a continuance on the ground of illness. Dougherty's attorney also represented the corporation, but stated he would absent himself and that the corporation could be tried in his absence. (Tr. 5.) No request was made to sever or continue the case against the corporation, or to substitute counsel, although individual defendants present represented the entire stock ownership. (Govt. Ex. 142.) Thus the case proceeded to trial against petitioner, the corporation, and Mrs. Josephine Sciandra.

Petitioner complains about the introduction against the corporation of two admissions by its president, Robert Dougherty. At the trial a revenue agent testified that during the tax investigation he had questioned Dougherty in his capacity as president and that Dougherty had told him (1) that there were no women working on the corporation's premises but that his daughters performed services at an office in his home (Tr. 877), (2) that he gave the $12,000 in miscellaneous expense checks made out to cash to an unidentified individual (Tr. 868), and (3) that the $18,000 in drainage expense checks

> were paid to Louis Melosi and Joseph Boccaccini but that these gentlemen did not perform drainage work for the Knox Coal Company or any other services directly connected with the operation of the mine. He stated they did perform some services for the corporation, and he also stated that they were connected with the union in some manner. [Tr. 869, R. 7b]

Petitioner did not object to the first two admissions but did object to the third (R. 7b). The government's attorney stated that these admissions were offered only against the corporation (Tr. 871), and the trial judge immediately instructed the jury (Tr. 872, R. 9b):

> The jury will be instructed that this testimony has only application to the Knox Coal Company, and will have no bearing, no relation at all to the other two defendants.

In its charge, the court also instructed the jury that declarations by a particular defendant after a conspiracy is ended cannot be considered against any defendant not present when the declaration was made. (Tr. 1123.)

Petitioner is incorrect in representing that the prosecutor linked petitioner's name to the statements by Dougherty (Pet. 21). Petitioner's transcript references relate to argument on the admissibility of testimony summarizing the total wages paid to those persons related to petitioner (Tr. 881–882). The admissions did not identify petitioner. The court's instructions qualify as those "clear" instructions which a jury can reasonably be expected to follow. *Delli Paoli* v. *United States,* 352 U.S. 232, 242; *Wong Sun* v. *United States,* 371 U.S. 471, 490.

Dougherty personally signed the checks in question as well as the corporation's tax return. His attempt to justify these deductions to the revenue agent in the course of an official inquiry is thus clearly admissible against the corporation of which he was then president. *Pan American Co.* v. *United States,* 273

U.S. 456, 498–500, and cases cited therein, particularly *Aetna Indemnity Co.* v. *Auto-Traction Co.*, 147 Fed. 95, 98 (C.A. 9); *Joslyn* v. *Cadillac Co.*, 177 Fed. 863, 865 (C.A. 6); *Chicago, Burlington & Quincy R.R. Co.* v. *Coleman*, 18 Ill. 297, 298.

3. In commencing his rebuttal argument, the prosecutor stated he would reply to the closing arguments of both petitioner and his co-defendant, Mrs. Sciandra. The court interrupted as follows (Tr. 1100):

> The COURT. I don't think there is any rebuttal of Mr. Kosik's case [Kosik was petitioner's attorney]. He [petitioner] didn't take the stand. Doesn't that give him the final closing? You do have rebuttal as to Mrs. Sciandra. Don't you agree?
>
> Mr. BROWN. Yes, I believe that is so because he didn't take the stand. What the judge has just remarked, that since Mr. Lippi didn't take the stand that we will be limited in our rebuttal remarks to what Mr. Degillio had to say. So I will be more brief than I planned.

This ruling gave petitioner a distinct procedural advantage and he made no objection at this time. After all closing arguments were concluded he moved for a mistrial, which the court denied. But the judge emphatically charged the jury (R. 9b–10b, Tr. 1111, 1142):

> Now, the defendant, Mr. Lippi, did not take the stand. You will draw no inference from the fact that he did not take the stand. That is his right and his privilege. There is no burden on him to prove his innocence. By his plea of "not guilty" he had made a complete

> denial of the charge. As indicated before, the Government has the burden of proving his guilt beyond any reasonable doubt.
>
> * * * * * * *
>
> * * * I instruct you to completely disregard the statement by the United States Attorney in the rebuttal to Mr. Lippi, and the reason for that is this. The law is perfectly clear on that, that a defendant not taking the stand in his own defense, and which is his perfect right; it is nobody's business but his own as I indicated to you. He is under no obligation to take the stand; by doing that his counsel has the final—has the right to make the final address to the jury. In other words, the Government has no rebuttal. It was a slight lapse on the part of Mr. Brown and no damage was done.

In the cases cited by petitioner, the fatal remarks were *intended* to provoke critical inferences. Even in such cases federal courts have ruled that the error is rendered harmless by adequate instruction to the jury. *United States* v. *DiCarlo*, 64 F. 2d 15, 17 (C.A. 2); *Langford* v. *United States*, 178 F. 2d 48, 55 (C.A. 9), certiorari denied, 339 U.S. 938; *Robilio* v. *United States*, 291 Fed. 975, 985–986 (C.A. 6), certiorari denied, 263 U.S. 716; *Wright* v. *United States*, 108 Fed. 805, 811–813 (C.A. 5). See also, *Peden* v. *United States*, 223 F. 2d 319, 321 (C.A. D.C.), certiorari denied, 359 U.S. 971; *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10); *Nolen* v. *United States*, 190 F. 2d 418, 420 (C.A. 6); *Nobile* v. *United States*, 284 Fed. 253, 255 (C.A. 3). The same court which in other circumstances has held improper argument incurable (*United States* v. *Schwartz*, 325 F. 2d 355 (C.A. 3))

has evaluated the colloquy herein as bereft of prejudicial intent or content. This judgment seems correct beyond question.

This incident could not have been understood by the jury as critical of petitioner's election not to testify. His counsel conceded the remarks were factual and not uttered in any critical sense (Tr. 1106) and the belated request for a mistrial confirms this contemporaneous concession. Unlike *DeLuna* v. *United States*, 308 F. 2d 140 (C.A. 5), the jury convicted *both defendants*, including the one who testified.

Finally, prompt objection is a requisite to such a complaint. *Milton* v. *United States*, 110 F. 2d 556 (C.A.D.C.). Petitioner's counsel raised no objection until after all closing arguments had been completed.

4. Petitioner also claims that he was prejudiced because the government failed to produce a statement given by a government witness to a different government investigator in an investigation of a different company. Government witness George Daileda testified that petitioner had cashed many checks which were made out to cash or other payees. Pursuant to demand under 18 U.S.C. 3500 the government produced the Special Agent's memorandum of an interview with Daileda about these checks (Tr. 837; R. 3b–4b). Moreover, Daileda had previously testified before the grand jury and in two trials (R. 50a–51a). On these previous occasions Daileda had either denied that petitioner cashed the Knox corporation checks here in question or stated that he did not remember

who had cashed them (Tr. 852-857). During cross-examination by petitioner's counsel Daileda freely admitted lying on these prior occasions (R. 47a-51a).

After the trial of the instant case petitioner was tried for an offense involving wholly different checks issued by an unrelated corporation. During that trial the prosecutor furnished petitioner's counsel with a copy of questions and answers given by Daileda to an investigator who had not been involved in the Knox Coal Co. case (R. 52a). This statement dealt with checks issued by Newport Excavating Co. (R. 52a). Question and answer No. 202 were as follows (R. 52a):

> Q. Did Mr. Lippi ever bring in anyone else's check other than his personal check? A. No.

The trial judge found that the government's failure to supply this statement to petitioner during trial of the instant case was inadvertent (R. 52a), and that even if the answer could conceivably be interpreted as relating to the Knox checks, it was merely repetitious of the inconsistent statements petitioner's counsel already knew about. (R. 54a). He thus denied a motion for a new trial based on the newly discovered statements (R. 55a). This ruling was a sound exercise of the judge's discretion.

Forearmed with knowledge of Daileda's contradictory testimony in prior public trials, possessed of the Special Agent's interview memorandum, and assured by the prosecutor that Daileda's grand jury testimony was of a piece with his false testimony in the prior public trials (Tr. 841), petitioner's counsel ex-

haustively cross-examined Daileda and gained admissions from him of prior inconsistent statements.

Under the most favorable interpretation this answer could add nothing material to the impeaching evidence already known to defense counsel. His lack of access to it was not prejudicial to petitioner. *Rosenberg* v. *United States,* 360 U.S. 367, 371, *Killian* v. *United States,* 368 U.S. 231, 243; *Ogden* v. *United States,* 303 F. 2d 724, 737 (C.A. 9). A new trial for newly discovered prior contradictions may be denied where they are merely cumulative to prior contradictions demonstrated in the trial. *Simmons* v. *United States,* 308 F. 2d 324, 325–326 (C.A.D.C.); *United States* v. *Rutkin,* 208 F. 2d 647, 654 (C.A. 3). See also, *Slappey* v. *United States,* 110 F. 2d 528 (C.A. 5); *United States* v. *Garrison,* 296 F. 2d 461 (C.A. 7), certiorari denied, 369 U.S. 804.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.
RICHARD M. ROBERTS,
Acting Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

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